No. 12468

United States
Court of Appeals
for the Ninth Circuit.

HERBERT WINDSOR and BAEDA E. WINDSOR, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division

FILED
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PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

PERRY P. YOHE,

11579 Hamlin Street,
North Hollywood, California,

Attorney for Plaintiffs and Appellants.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for United States of America,
Defendant and Appellee.

In the District Court of the United States for the Northern District of California, Southern Division

No. 28017-H

HERBERT WINDSOR, BAEDA E. WINDSOR, Husband and Wife,

Plaintiffs,

vs.

YOSEMITE PARK & CURRY CO., a California Corporation, UNITED STATES OF AMERICA,

Defendants.

COMPLAINT FOR DAMAGES FOR NEGLIGENCE

I.

Plaintiffs complain and allege, that the ground upon which jurisdiction of the court depends is that the United States of America is a party defendant herein. That plaintiffs are citizens of the State of California, and reside in the County of Los Angeles, State of California. That during all times herein mentioned, the defendant, Yosemite Park and Curry Co. was, and still is a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business in the City and County of San Francisco, State of California.

II.

That the matter in controversy herein exclusive of costs exceeds the sum of $3,000.00.

III.

That the defendants at all times herein mentioned operated, controlled, managed and maintained camps catering to the public in the Yosemite National Park, which is situated in the State of California. That said Park is under the jurisdiction and control of the defendant United States of America. That among said camps is the camp referred to and known as the Lodge. That at said Lodge camp, defendants operate, manage, control and maintain buildings containing a cafeteria, gift shop, and other business, and also paved parking areas and sidewalks for the benefit of their customers, invitees, and the public generally. That said Lodge cafeteria opens on to a porch, which in turn opens on to a wooden platform, or sidewalk, constructed of boards. That directly across from said platform, or sidewalk from the entrance to the porch, there is single concrete step for public use to descend to a paved parking area for automobiles. That the level of said concrete step was not midway between the elevation of the said platform, and the grade of the said parking area. That at the bottom of, and immediately next to, and running along the face of said concrete step was a gutter, or depression in the said pavement which was approximately

three to four inches across and one to two inches in depth.

IV.

That at approximately 8 p.m. of the 21st day of June, 1947, plaintiff Baeda E. Windsor, after dining at the said Lodge cafeteria, was proceeding at all times in a careful and lawful manner to plaintiffs' automobile parked in the said parking area, and in such manner crossed the said porch, and the said platform, and to the edge thereof. That the said edge was in a dangerous and defective condition, in that the ends of the boards were worn and partially decayed, and were in a jagged condition. That no guard rails of any kind were installed by said concrete step. That no direct lighting was provided at said concrete step and the surrounding area. That because of the darkness of the night, and inadequate lighting, the aforesaid condition of the said edge was not apparent to said plaintiff. That no signs warning the public of the dangerous condition of said platform edge, and pavement depression were posted. That solely through the carelessness and negligence of the defendants as hereinafter set forth, the foot of plaintiff Baeda E. Windsor, slipped into a jagged, or uneven place in the edge of said platform causing said plaintiff to lose her balance, and step down the said concrete step, and into the depression in the pavement, in such manner as to cause her to fall violently to the pavement, and that as a direct and proximate result

thereof she sustained severe injuries, the same being hereinafter more specifically set forth.

V.

That the defendants were then and there careless and negligent in the following particulars, to-wit:

(a) In failing to maintain said platform, or sidewalk flooring in a safe condition. The partially decayed, jagged and worn condition of the said platform planks above the aforementioned concrete step, rendered said means of egress and ingress to the said cafeteria, and other facilities operated by the defendants extremely hazardous and dangerous to defendants' customers, invitees and to the public;

(b) In failing to maintain adequate lighting for the safety of their customers, invitees and the public, at said time and place rendering said means of ingress and egress extremely dangerous and hazardous to defendants' customers, invitees and to the public using the same;

(c) That defendants at said time and place carelessly and negligently failed to warn, or advise their customers, invitees and the public, among whom was plaintiff, Baeda E. Windsor, of the existence of the unsafe conditions of the said edge of the platform flooring, although defendants knew, or should have known that the said plaintiff was unaware of the existence of same;

(d) That defendants as said time and place carelessly and negligently maintained the pavement immediately adjacent to said concrete step. That

said pavement was of uneven surface, and of a different grade from the main pavement, rendering same extremely dangerous and hazardous to customers, invitees and to the public using the same; that defendants knew, or should have known that plaintiff Baeda E. Windsor, was unaware of the existence of said condition of the said pavement.

VI.

As a direct and proximate result of defendants' negligence, carelessness and unlawful conduct, as aforesaid, and by reason of plaintiff's fall so negligently caused by defendants, plaintiff, Baeda E. Windsor, was hurt and injured in her health, strength and activity, sustaining severe shock, fractures of the fibula in each leg, and injuries to the muscles, ligaments and tendons in both legs, all of which said injuries have caused and continue to cause said plaintiff great physical pain and suffering, all to her damage in the sum of $10,000.00.

For a Further and Second Cause of Action, Plaintiffs Allege:

I.

Reallege and incorporate paragraphs I to V, inclusive, of the first cause of action, as though set forth herein in full.

II.

That by reason of said injuries plaintiff, Baeda E. Windsor, was compelled to and did remain in

the hospital for a period of 3 days, so as to enable said injuries to be properly treated, plaintiffs incurring hospital bills therefor in the sum of $39.50, which sum is the usual, reasonable and customary charge therefor; that plaintiffs were compelled to and did employ the services of physicians to treat said injuries, incurring thereby an indebtedness in the sum of $86.00, which sum is and was the reasonable value of said services; That plaintiffs were compelled to and did obtain X-rays, drugs and medical supplies in the sum of $78.00, which is and was the *reasonable thereof;* that plaintiffs were compelled to and did employ the services of a nurse, and others to assist the said Baeda E. Windsor, in the treatment of said injuries, and in waiting upon her, incurring an indebtedness therefor in the sum of $260.00, aggregating in all the sum of $463.50, which sum was and is the reasonable value of the aforementioned services and materials.

Wherefore, plaintiffs pray for judgment against the defendants, and each of them for the sum of $10,000.00, on the first cause of action; and for the sum of $463.50 on the second cause of action; for costs of suit, and for such other and further relief as to the Court may seem proper.

/s/ PERRY P. YOHE,
Attorney for Plaintiffs.

State of California,
County of Los Angeles—ss.

Baeda E. Windsor, being by me first duly sworn, deposes and says: That she is plaintiff in the fore-

going and above entitled action; that she has read the foregoing complaint, and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ BAEDA E. WINDSOR.

Subscribed and Sworn to before me this 2nd day of Apr., 1948.

[Seal] /s/ MAUDE O. WERNHOFF,
Notary Public in and for said County and State.

[Endorsed]: Filed April 16, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT YOSEMITE PARK & CURRY CO. TO COMPLAINT

Defendant Yosemite Park & Curry Co., for its answer to the complaint in the above entitled action, admits, denies and alleges as follows:

As to First Alleged Cause of Action

I.

This defendant admits each and every allegation contained in paragraphs I, II and III of the first alleged cause of action of said complaint.

II.

This defendant denies each and every allegation

contained in paragraph IV of the first alleged cause of action of said complaint, except that this defendant admits that no guard rails were installed by said concrete step and that no signs were posted, and in this connection this defendant alleges that no dangerous condition existed and that no signs were needed.

III.

This defendant denies each and every allegation contained in paragraphs V and VI of the first alleged cause of action of said complaint; and, in this connection, this defendant denies that plaintiff Baeda E. Windsor has been injured or damaged in any manner or amount whatsoever by reason of any carelessness, or negligence, or act, or omission of this defendant, or of any servant, agent, or employee of this defendant.

IV.

As and for a Further and Separate Defense, this defendant alleges that plaintiffs, and each of them, were careless and negligent in and about the matters alleged in said complaint, and that said carelessness and negligence on said plaintiffs' own part proximately contributed to the happening of the accident and to the injuries, loss and damage complained of, if any there were.

As to Second Alleged Cause of Action

I.

For its answer to paragraph I of the second alleged cause of action of said complaint, this de-

fendant hereby repeats and makes a part hereof all of its foregoing admissions, denials, allegations and separate defense contained in its answer to the first alleged cause of action of said complaint.

II.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph II of the second alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every allegation contained in said paragraph II.

Wherefore, this defendant prays that plaintiffs, or either of them, take nothing herein, and that this defendant have judgment for its costs of suit herein incurred.

DANA, BLEDSOE & SMITH,
Attorneys for Defendant,
Yosemite Park & Curry Co.

State of California,
City and County of San Francisco—ss.

Leighton M. Bledsoe, being first duly sworn, deposes and says:

That he is a member of the law firm of Dana, Bledsoe & Smith, which law firm has its offices at 440 Montgomery Street, San Francisco, California; that said Dana, Bledsoe & Smith are the attorneys for the defendant Yosemite Park & Curry Co., in

the above entitled action; that the officers of said defendant are absent from said City and County of San Francisco, where affiant has his and said law firm have their offices, and for that reason affiant makes this verification for and on behalf of defendant; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters which are therein stated on his information or belief; and as to such matters he believes the same to be true.

/s/ LEIGHTON M. BLEDSOE.

Subscribed and sworn to before me this 8th day of June, 1948.

[Seal] /s/ HAZEL E. THOMPSON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 17, 1948.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now Defendant United States of America, and answering plaintiffs' complaint on file herein denies and alleges as follows:

I.

Answering the first count or cause of action of said complaint, said defendant denies and alleges as follows:

1. Denies each and all the allegations of paragraphs III, IV, V and VI of said first count or cause of action, except that defendant admits that Yosemite National Park is under the jurisdiction and control of the defendant.

2. Denies that plaintiffs, or either of them, have been damaged in the sum of $10,000.00, or any part thereof, or in any sum or amount, or at all.

II.

Answering the second count or cause of action of said complaint, said answering defendant denies and alleges as follows:

1. Answering the allegations of paragraphs I to V, inclusive, of the first cause of action incorporated by reference in paragraph I of said second count or cause of action, said answering defendant here refers to and incorporates herein as though fully set forth its answers to said paragraphs as set forth in its answer to said first count or cause of action herein.

2. Said defendant has no information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph II of said second count or cause of action, and therefore in placing its denial upon that ground denies each and all of said allegations.

3. Denies that plaintiffs, or either of them, have been damaged in the sum of $463.50, or any part thereof, or in any sum or amount, or at all.

III.

Further answering said complaint and each of the two counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said complaint and each of the two separate counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges that the conditions complained of in said complaint were open and obvious conditions and were known to the plaintiff Baeda E. Windsor herein, and that said plaintiff at the time referred to in said complaint assumed the risk of injury from said conditions.

V.

Further answering said complaint and each of the two separate counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages compained of, if any, were due to and caused by plaintiff Baeda E. Windsor's own negligence proximately contributing thereto; and allege that at the time and place referred to in said complaint said plaintiff Baeda E. Windsor failed to use ordinary

care and caution to protect herself from injury, failed to use her eyes and other faculties, and carelessly and negligently stood, walked and conducted herself upon the occasion referred to in said complaint, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

VI.

Further answering said complaint and each of the two separate counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges: That at the time referred to in said complaint the premises upon which the accident referred to in the complaint is alleged to have occurred were not in the custody or control of said defendant, nor were said premises at that time maintained by said defendant, but that said premises were at all times referred to in said complaint under the custody and control of and were maintained by Yosemite Park and Curry Company, a corporation, under and by virtue of the terms of a certain agreement entered into between the defendant United States of America and the said Yosemite Park and Curry Company, dated October 1, 1932, under and by virtue of the terms of which agreement the said premises were controlled, operated and maintained by said Yosemite Park and Curry Company.

Wherefore, said defendant prays that plaintiffs take nothing by their complaint herein, and that

said defendant may be hence dismissed with its costs.

FRANK J. HENNESSY,
By /s/ DANIEL C. DEASY,
United States Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant,
United States of
America.

[Endorsed]: Filed January 14, 1949.

[Title of District Court and Cause.]

JUDGMENT OF DISMISSAL

The motion of defendant Yosemite Park & Curry Co. to dismiss the above action as to it for lack of jurisdiction having come on regularly to be heard on the 12th day of July, 1949, before the Honorable Herbert W. Erskine, Judge of the United States District Court for the Northern District of California, Southern Division, and the same having been duly presented by Morton B. Jackson of the firm of Dana, Bledsoe & Smith, attorneys for said defendant, and the plaintiffs appearing by Messrs. Harry P. Yohe and Cameron Lillie, their attorneys, and defendant United States appearing by Daniel Deasy, Assistant U. S. Attorney, and the same having been fully argued and heard and good cause appearing therefor,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the above entitled action be and the same is hereby dismissed as to said defendant Yosemite Park & Curry Co. for lack of jurisdiction.

Dated:

/s/ HERBERT W. ERSKINE,
Judge of the United States
District Court.

[Endorsed]: Filed July 18, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28017-H-E

HERBERT WINDSOR, BAEDA E. WINDSOR, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action coming on regularly for trial on July 12, 1949, before the Court sitting without a jury, Perry P. Yohe, Esquire, appearing as attorney for the plaintiffs, and Frank J. Hennessy, through Rudolph J. Scholz, appearing as attorney for the defendant United States of America, the Court having heard the testimony, examined

the proofs, and the cause having been submitted upon briefs, and the Court being fully advised in the premises and having made its Findings of Fact and Conclusions of Law;

Now, Therefore, by reason of the law and the Findings aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

I.

That judgment is hereby granted in favor of the defendant United States of America and against the plaintiffs Herbert Windsor and Baeda E. Windsor;

II.

That defendant United States of America is entitled to recover its costs against the said plaintiffs in the sum of $.....

Dated: October 31st, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

Entered in Civil Docket Nov. 1st, 1949.

[Endorsed]: Filed Oct. 28, 1949.

In the United States District Court for the Northern District of California, Southern Division.

No. 28017-H-E

HERBERT WINDSOR, BAEDA E. WINDSOR, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on regularly for trial on July 12, 1949, before the Court sitting without a jury, Perry P. Yohe, Esquire, appearing as attorney for the plaintiffs and Frank J. Hennessy, through Rudolph J. Scholz, appearing as attorney for the defendant United States of America, the Court having heard the testimony, examined the proofs, and the cause having been submitted upon briefs, and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

Findings of Fact

I.

That all the allegations of the complaint contained in paragraphs I and II and that the Yosemite National Park was under the jurisdiction

and control of the United States of America, are true;

II.

That all the allegations of paragraphs III and IV are not true in so far as they refer to the United States of America;

III.

That all the allegations of paragraphs V and VI, so far as they refer to the United States of America, are not true;

IV.

That any injuries or damages which the plaintiffs suffered were not the liability or responsibility of the United States of America; that there is no evidence of any negligent or wilful act or omission on the part of any employee of the United States while acting within the scope of his office or employment, or otherwise;

V.

That plaintiff Baeda E. Windsor was herself negligent and her own negligence proximately contributed to the accident, injuries and damages complained of;

VI.

That the defendant United States of America was not negligent.

Conclusion of Law

The Court concludes that the plaintiffs are not entitled to judgment against the defendant United

States of America and that the defendant United States of America is entitled to judgment against plaintiffs for its costs in the sum of $.....

Let judgment be entered accordingly.

/s/ HERBERT W. ERSKINE,
United States District Judge.

Dated: San Francisco, California, October 31st, 1949.

[Endorsed]: Filed Oct. 28, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

No. 28017 H

HERBERT WINDSOR, BAEDA E. WINDSOR, husband and wife,

Plaintiffs,

vs.

YOSEMITE PARK & CURRY CO., a California Corporation, UNITED STATES OF AMERICA,

Defendants,

NOTICE OF APPEAL

To the Defendant, United States of America and Its Attorney Frank J. Hennessy, Esq.,

Notice is hereby given that Herbert Windsor, and Baeda E. Windsor, husband and wife, plain-

tiffs in the above entitled action, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 1st day of November, 1949, in favor of defendant United States of America, and against plaintiffs above named and from the whole of such judgment.

Dated: December 22, 1949.

/s/ PERRY P. YOHE,
Attorney for Appellants.

[Endorsed]: Filed Dec. 23, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PAPERS AND RECORDS ON APPEAL

To the Defendant, United States of America and Its Attorney Frank J. Hennessy, Esq.

You and Each Of You, will please take notice that the Plaintiffs on their Appeal from the Judgment entered in the above entitled Cause, designates the following papers, records, and exhibits, to wit:

The Judgment Roll:

1. The Complaint and the Answers thereto, Motions, Orders of the Court, all Notices duly filed, and Judgment after Trial.

2. All Exhibits admitted in evidence, and specifically the following:

(a) Defendants Exhibit 1, being a drawing of the locus in quo.

(b) Plaintiff's Exhibit 3, being a reconstructed cross-section of the platform, concrete step and Parking Area level, with the depression indicated in the said paved Parking Area.

(c) Plaintiff's Exhibit 8, being a Lease of the premises wherein the Government of the United States is Lessor, and Yosemite Park & Curry Co., is Lessee.

(d) Plaintiff's Exhibits 9 and 10, being two letters Exhibit 9, referred to as the Ross-Loos Letter, Exhibit 10, referred to as the Avery Stern Letter.

(e) Plaintiff's Exhibit 12, being a Building Code issued by the United States Department of the Interior, National Park Service.

(f) All other Exhibits properly admitted in evidence.

3. The Notice of Appeal, and the Designation of Papers and Records.

4. The Reporter's Transcript of the Trial Proceedings.

Dated: December 28, 1949.

/s/ PERRY P. YOHE,
Attorney for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 28, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein as designated by the Appellant, to wit:

Complaint for Damages for Negligence.

Answer of Defendant Yosemite Park & Curry Co. to Complaint.

Answer to Complaint.

Judgment of Dismissal.

Judgment.

Findings of Fact and Conclusions of Law.

Notice of Appeal.

Designation of Papers and Records on Appeal.

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court this 31st day of January, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12468. United States Court of Appeals for the Ninth Circuit. Herbert Windsor and Baeda E. Windsor, husband and wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 31, 1950.
/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12468

HERBERT WINDSOR, BAEDA E. WINDSOR, Husband and Wife,
Plaintiffs and Appellants,

vs.

YOSEMITE PARK & CURRY CO., a California Corporation,
Defendant,

UNITED STATES OF AMERICA,
Defendant and Appellee.

CONCISE STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD

Plaintiffs-appellants make the following statement of points upon which they intend to reply:

That the trial court erred in each of the following respects:

1. In finding and holding that the Defendant, United States of America, as a Lessor, owed no duty to the Plaintiff, Baeda E. Windsor, and therefore in the event of negligence would not be liable for damages.

2. In finding and holding that the Defendant, United States of America, had no control over the condition of the platform, the concrete step, or the

surface of the parking lot, and was therefore free from any negligent act or omission.

3. In finding and holding that the Defendant, United States of America, was not negligent.

4. In finding and holding that the Plaintiff, Baeda E. Windsor was negligent and that her negligence was the proximate cause of her injuries.

5. In refusing to find that the defendant, United States of America, as a Lessor and Landlord, was negligent.

6. In refusing to find that the Defendant, United States of America, had exclusive control over the construction, maintenance, and repair of the parking area for motor vehicles.

7. In refusing to find that the Defendant, United States of America, in constructing and otherwise maintaining the drain in the surface of the parking area was negligence per se.

The entire record as certified to you must be printed in its entirety as the above points upon which the Plaintiffs intend to rely on appeal, are framed by the pleadings, proceedings and judgment in that record.

Dated: February —, 1950.

/s/ PERRY P. YOHE,
Attorney for Plaintiffs and
Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 11, 1950.